A

LAI HEN BENG v. PP

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
MOHAMAD ZABIDIN MOHD DIAH CJ (MALAYA)
HARMINDAR SINGH DHALIWAL FCJ
B ABU BAKAR JAIS FCJ
AB KARIM AB JALIL FCJ
[CIVIL REFERENCE NO: 06(RJ)-3-04-2023(B)]
15 DECEMBER 2023

C

Abstract – *Section 498 of the Penal Code, a pre-Merdeka law which criminalises a man for enticing a married woman, is unconstitutional as it is in violation of the fundamental principle of equality enshrined in art. 8(1) and (2) of the Federal Constitution ('FC'). Section 498 ought to be repealed under art. 162 of the FC, not on the ground that it is anachronistic and archaic, but for the sole reason that adapting or amending it would not otherwise satisfy the requirement of art. 162 to bring s. 498 into accord with art. 8(2) of the FC.*

D

E ***CONSTITUTIONAL LAW:*** *Federal and State laws – Constitutionality – Constitutionality of s. 498 of Penal Code – Whether s. 498 unlawfully discriminates against women by treating them with indignity and inequality – Whether s. 498 in violation of fundamental principle of equality governed under art. 8(1) and (2) of Federal Constitution*

F ***CONSTITUTIONAL LAW:*** *Federal and State laws – Pre-Merdeka law – Constitutionality of s. 498 of Penal Code – Whether s. 498 unlawfully discriminates against women by treating them with indignity and inequality – Whether s. 498 in violation of fundamental principle of equality governed under art. 8(1) and (2) of Federal Constitution – Whether s. 498 could be judicially amended under art. 162(7) of Federal Constitution – Whether s. 498 ought to be judicially repealed in its entirety*

G

The appellant was charged at the Magistrates' Court, under s. 498 of the Penal Code ('PC') *ie*, an offence of enticing or taking away or detaining, with a criminal intent, a married woman. In the course of the proceedings, the
H appellant challenged the constitutionality of s. 498; the matter was transmitted to the High Court and later to the Federal Court, pursuant to ss. 30 and 84 of the Courts of Judicature Act 1964 ('CJA'). The constitutional question that arose for determination was whether s. 498 was unconstitutional as it violated the fundamental principle of equality governed
I under art. 8(1) and (2) of the Federal Constitution ('FC'). In support of the said challenge, and in urging the court to strike down s. 498, the appellant

argued that: (i) s. 498 unlawfully discriminated against women as the said section followed the paternalistic and archaic approach of treating women as chattel to their husbands; and (ii) while an aggrieved husband was entitled to pursue the prosecution of any other person who had enticed or taken away his wife, there was no recourse to a wife whose husband is enticed by another woman. In other words, s. 498 only protected a husband's right to a peaceful and happy marriage without the interference of a third party. This, according to the appellant, discriminated against women by treating them with indignity and inequality, in violation of art. 8(1) and (2).

Held (answering constitutional question in the affirmative to extent related to art. 8(2) of Federal Constitution)
Per Tengku Maimun Tuan Mat CJ delivering the judgment of the court:

(1) Article 8(1) of the FC is the all-encompassing provision on equality in that all persons are equal before the law and are entitled to the equal protection of the law. In this sense, clearly discernible persons or classes of persons could be differentiated and discriminated against, provided that (i) the discrimination bears a reasonable nexus to a legitimate aim; and (ii) the measure itself is proportionate to the said Legislative objective it serves. Article 8(2) of the FC, however, is a specific anti-discrimination provision that stipulates that 'there shall be no discrimination' against citizens, as opposed to 'all persons', on the grounds only of religion, race, descent, place of birth or gender. If that discrimination has been established and the discrimination is only on any of the grounds stated in art. 8(2), then such discrimination could only be justified by express authorisation from the FC itself. Given this express constitutional directive, it followed that in respect of any discrimination on any of the grounds only in art. 8(2), the general tests of art. 8(1) could not apply. (paras 23 & 24)

(2) Section 498 of the PC was unconstitutional for the reason that it unlawfully discriminated on the ground of gender, which was violative of art. 8(2) of the FC. Section 498 only entitled husbands to rely on the provision to the exclusion of all wives. The law was drafted to protect the right of husbands by allowing them to seek prosecution of anyone who effectively stole their wives from them. This was discrimination on grounds of gender only. The fact that this was the case was also made amply lucid by what was stated in s. 132 of the Criminal Procedure Code. The respondent failed to point out any provision of the FC that expressly authorised discrimination on the grounds of gender only in the form that s. 498 connoted. As such, s. 498 was inconsistent with art. 8(2) and was, therefore, unconstitutional. (paras 26, 27, 29 & 95)

(3) Section 498 of the PC was a pre-Merdeka law and, in light of art. 162(6) and (7) of the FC, the court could not immediately take the approach of simply suggesting to strike it down, as was the only option under art. 4(1) of the FC for post-Merdeka laws. According to art. 162(6), s. 498 must be applied 'with such modifications as may be necessary to bring into accord with provisions of this Constitution'. However, s. 498 was incapable of judicial amendment under art. 162(7) of the FC because doing so would require extensive amendment to the extent of changing the character of the offence. While judicial amendment to s. 498, in the way constitutionally permitted by art. 162(7), would remove the discrimination, that exercise of amendment would also tantamount to redefining the original purpose of the section to the extent that it would alter the very basis upon which the offence in s. 498 was originally enacted. Doing this would not amount to solely bringing the provision of s. 498 into accord with the FC but to an act of judicial legislation. The only possible means to bring s. 498 into accord with the FC was to judicially repeal it in its entirety. (paras 64, 75, 94, 97 & 98)

(4) This judgment was to be taken to have effect prospectively to preserve all previous prosecutions that had already come to pass. The case was remitted to the High Court to be dealt with in accordance with s. 85 of the CJA. It was for the High Court to make the appropriate (i) declarations and orders to give effect to this judgment and otherwise in accordance with the law; and (ii) directions for the ongoing proceedings at the Magistrates' Court. (paras 104 & 105)

Obiter:

[1] Section 498 of the PC was an archaic and anachronistic provision which came from an unfortunate bygone Victorian era when women were regarded as the personal property of men or even an extension of men, not unlike how slaves were treated for a long time until abolished in the last century. It took humankind many years to accept that slavery of men and discrimination against women were wrong. To suggest that a man or a woman could be considered as property of each other is a regressive step and going back in time to a dark era; this concept is obsolete. In the modern era, men and women are both capable of being independent and making their own decisions. They could hardly be considered as victims of enticement. However, there were constitutional limits and the fact that s. 498 was anachronistic had no bearing to the assessment of its constitutional validity. Whether a law should exist *per se* on the grounds of anachronism was a Legislative matter. While art. 162(6) of the FC allowed the Judiciary to modify a pre-Merdeka law, in a way resembling the Legislative's power, such power must only be applied to the extent of bringing that pre-Merdeka law into accord

with the FC and not for the purpose of judicial reformation. Whether or not this anachronistic law of s. 498 should remain in our statute books purely on the ground that was outdated was, *per se*, purely an academic Legislative question and one that our elected lawmakers must deliberate upon if they, after this decision, think it necessary to revive it in one form or another. The Judiciary, or individual judges, cannot engage in judicial legislation or reformation to the extent of substituting their private views for the law. (paras 100-103)

Bahasa Malaysia *Headnotes*

Perayu dituduh di Mahkamah Majistret, bawah s. 498 Kanun Keseksaan ('KK'), iaitu satu kesalahan memikat atau membawa pergi atau menahan seorang perempuan yang bersuami dengan niat jenayah. Semasa prosiding, perayu mencabar keperlembagaan s. 498; hal perkara tersebut dipindahkan ke Mahkamah Tinggi dan kemudian ke Mahkamah Persekutuan, bawah ss. 30 dan 84 Akta Mahkamah Kehakiman 1964 ('AMK'). Soalan perlembagaan yang berbangkit untuk diputuskan adalah sama ada s. 498 berperlembagaan kerana mencabuli prinsip asas kesamarataan yang diselia oleh per. 8(1) dan (2) Perlembagaan Persekutuan ('PP'). Mengukuhkan lagi cabarannya, dan dalam menggesa mahkamah membatalkan s. 498, perayu menegaskan bahawa: (i) s. 498 secara tidak sah mendiskriminasi terhadap wanita kerana seksyen ini mengguna pakai pendekatan yang paternalis dan sudah lapuk dengan menganggap wanita sebagai harta milikan suami mereka; dan (ii) seorang suami yang terkilan berhak memulakan pendakwaan terhadap mana-mana orang yang memikat atau mengambil isterinya sedangkan tiada jalan buat seorang isteri yang suaminya dipikat oleh wanita lain. Dalam erti kata lain, s. 498 hanya melindungi hak seorang suami terhadap rumah tangga yang aman dan bahagia tanpa campur tangan pihak ketiga. Ini, menurut perayu, mendiskriminasi terhadap wanita kerana memperlakukan mereka secara hina dan tidak sama rata, satu pencabulan per. 8(1) dan (2).

Diputuskan (menjawab soalan perlembagaan secara afirmatif setakat berkaitan per. 8(2) Perlembagaan Persekutuan)
Oleh Tengku Maimun Tuan Mat KHN menyampaikan penghakiman mahkamah:

(1) Perkara 8(1) PP adalah peruntukan yang meliputi kesamarataan iaitu semua orang adalah sama rata di sisi undang-undang dan berhak mendapat perlindungan sama rata di sisi undang-undang. Dari segi ini, orang-orang yang jelas dapat dilihat atau kategori-kategori orang boleh dibezakan dan didiskriminasikan jika (i) diskriminasi tersebut mempunyai pertalian munasabah dengan matlamat yang sah; dan (ii) ukurannya bersekadar dengan fungsi matlamat perundangan itu sendiri. Perkara 8(2) PP, sebaliknya, adalah peruntukan anti-

A diskriminasi yang menetapkan bahawa 'tidak boleh ada diskriminasi' terhadap warganegara, berbanding 'semua orang', atas alasan agama, bangsa, keturunan, tempat lahir atau jantina. Jika diskriminasi tersebut telah dibuktikan dan diskriminasi tersebut hanya atas mana-mana alasan yang dinyatakan dalam per. 8(2), maka diskriminasi itu hanya boleh
B dijustifikasikan dengan kuasa yang diberi secara tersurat oleh PP sendiri. Berdasarkan arahan nyata berperlembagaan ini, disusuli bahawa untuk mana-mana diskriminasi terhadap mana-mana alasan hanya dalam per. 8(2), ujian am per. 8(1) tidak terpakai.

(2) Seksyen 498 KK tidak berperlembagaan atas alasan seksyen tersebut
C secara tidak sah mendiskriminasi berasaskan jantina, yang mencabuli per. 8(2) PP. Seksyen 498 hanya memberi hak kepada para suami untuk berpaut pada peruntukan ini sementara mengecualikan para isteri. Undang-undang tersebut digubal untuk melindungi hak para suami dengan membenarkan mereka memulakan pendakwaan terhadap mana-
D mana orang yang membawa pergi isteri mereka daripada mereka. Ini satu diskriminasi berlandaskan jantina sahaja. Fakta bahawa inilah yang terjadi juga terang lagi bersuluh berdasarkan apa yang dizahirkan dalam s. 132 Kanun Tatacara Jenayah. Responden gagal menunjukkan mana-mana peruntukan dalam PP yang jelas memberi kuasa untuk
E diskriminasi atas alasan jantina sahaja dalam bentuk yang dimaksudkan oleh s. 498. Oleh itu, s. 498 tidak selari dengan per. 8(2) dan, berikutan itu, tidak berperlembagaan.

(3) Seksyen 498 KK adalah undang-undang sebelum Hari Merdeka dan, merujuk per. 162(6) dan (7) PP, mahkamah tidak boleh segera
F mengambil pendekatan mudah dengan mencadangkan seksyen tersebut dibatalkan seperti satu-satunya pilihan bawah per. 4(1) untuk undang-undang selepas Hari Merdeka. Menurut per. 162(6), s. 498 mesti dipakai dengan 'dengan apa-apa ubah suaian yang perlu untuk menyelaraskannya dengan peruntukan Perlembagaan ini'. Walau bagaimanapun, s. 498
G tidak boleh dipinda secara kehakiman bawah s. 162(7) PP kerana untuk berbuat sebegitu memerlukan pindaan besar hingga tahap menukar sifat kesalahan tersebut. Walaupun pindaan secara kehakiman pada s. 498, dalam cara berperlembagaan yang dibenarkan oleh per. 162(7), akan menyingkirkan diskriminasi, pindaan sedemikian sama seperti mentafsir
H semula tujuan asal seksyen tersebut hingga tahap mengubah asas utama mengapa kesalahan bawah s. 498 asalnya digubal. Berbuat demikian bukan terjumlah pada hanya menyelaraskan s. 498 dengan PP tetapi satu tindakan penggubalan secara kehakiman. Satu-satunya cara untuk menyelaraskan s. 498 dengan PP adalah memansuhkannya dengan menyeluruh secara kehakiman.

I

(4) Penghakiman ini mempunyai kesan prospektif demi mengekalkan kesemua pendakwaan terdahulu yang sudah berlalu. Kes ini dikembalikan ke Mahkamah Tinggi untuk ditangani selaras dengan s. 85 AMK. Mahkamah Tinggi bertanggungjawab membuat (i) perisytiharan-perisytiharan dan perintah-perintah wajar untuk memberi kesan pada penghakiman ini dan, jika tidak, selaras dengan undang-undang; dan (ii) arahan wajar terhadap prosiding yang sedang berjalan di Mahkamah Majistret.

Obiter:

(1) Seksyen 498 KK adalah peruntukan lapuk dan ketinggalan zaman yang bersusur galur dari zaman Victoria yang sudah berlalu semasa wanita dianggap harta milikan peribadi lelaki bahkan sebahagian seorang lelaki, tidak ubah sebagaimana hamba-hamba diperlakukan, untuk satu masa yang lama hingga ini dihapuskan pada abad terdahulu. Bertahun berlalu sebelum manusia mengakui bahawa perhambaan lelaki dan diskriminasi terhadap wanita adalah salah. Cadangan bahawa seorang lelaki atau wanita boleh dianggap sebagai harta milikan satu sama lain adalah satu langkah mundur dan berbalik ke zaman kelam; konsep ini sudah tidak lagi terpakai. Dalam zaman moden, lelaki dan perempuan mampu berdikari dan membuat keputusan mereka sendiri. Mereka tidak boleh dianggap sebagai mangsa godaan. Walau bagaimanapun, terdapat batasan perlembagaan dan hakikat bahawa s. 498 sudah ketinggalan zaman tiada kaitan dengan penilaian kesahan berperlembagaan. Sama ada satu-satu undang-undang wajar wujud atas alasan lapuk adalah, dengan sendiri, hal perkara Badan Perundangan. Walaupun per. 162(2) PP membenarkan Badan Kehakiman mengubah suai undang-undang sebelum Hari Merdeka, seakan-akan kuasa Badan Perundangan, kuasa sedemikian semestinya hanya terpakai setakat menyelaraskan undang-undang sebelum Hari Merdeka tersebut dengan PP dan bukan bertujuankan reformasi secara kehakiman. Sama ada undang-undang lapuk s. 498 ini patut kekal dalam buku-buku statut negara ini atas alasan ketinggalan zaman adalah, dengan sendiri, sepenuhnya soalan perundangan akademik dan satu soalan yang para penggubal undang-undang terlantik mesti pertimbangkan jika, ekoran keputusan ini, mereka fikirkan perlu untuk mengembalikannya dalam satu bentuk atau yang lain. Badan Kehakiman, atau seorang hakim, tidak boleh terlibat dalam penggubalan undang-undang secara kehakiman atau reformasi hingga tahap menggantikan undang-undang itu dengan pandangan peribadi mereka.

Case(s) referred to:
Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***
B Surinder Singh Kanda v. The Government Of The Federation of Malaya [1962] 1 LNS 14 PC ***(refd)***
Datuk Hj Harun Hj Idris v. PP [1976] 1 LNS 19 FC ***(refd)***
Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC ***(refd)***
PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(refd)***
PP v. Datuk Harun Hj Idris & Ors [1976] 1 LNS 180 HC ***(refd)***
Wong Shee Kai v. Government Of Malaysia [2022] 10 CLJ 1 FC ***(refd)***

Legislation referred to:
Aboriginal Peoples Act 1954, ss. 11, 12
Courts of Judicature Act 1964, ss. 30, 84(3), 85(2)
Criminal Procedure Code, s. 132
Federal Constitution, arts. 4(1), (3), (4), 5(1), 6(1), (2), 8(1), (2), 13(2), 159(6), 160(2), 162(1), (4), (6), (7)
Interpretation Acts 1948 and 1967, s. 3
Penal Code, ss. 302, 498
Revision of Laws Act 1968, s. 6(2), (3)

Other source(s) referred to:
Lord President Suffian, *An Introduction to the Constitution of Malaysia*, 3rd edn, Pacifica Publications, 2007, p 18

For the appellant - Jayarubbiny Jayaraj, Jay Moy Wei Jiun & Puteri Batrisyia Abdul Latif; M/s Jay & Jay
For the respondent - Yusaini Amer Abdul Karim & Eyu Ghim Siang; FC

Reported by Najib Tamby

JUDGMENT

Tengku Maimun Tuan Mat CJ:

Introduction

[1] The present and relatively straightforward challenge takes the form of a constitutional reference. The appellant argues that s. 498 of the Penal Code ('PC') is unconstitutional on the ground that it unfairly discriminates against women in violation of cls. (1) and (2) of art. 8 of the Federal Constitution ('FC').

[2] In terms of the brief facts, the appellant was charged with an offence under s. 498 of the PC in the Magistrate's Court. In the course of the proceedings, he sought to challenge the constitutionality of the said section. The matter was then transmitted to the High Court in Shah Alam and then further transmitted to the Federal Court. This happened consecutively in accordance with ss. 30 and 84 of the Courts of Judicature Act 1964 ('CJA 1964').

[3] In this regard, the sole constitutional question posed in this reference reads as follows:

> Whether section 498 of the Penal Code is unconstitutional as it violates the fundamental principle of equality governed under art. 8(1) and 8(2) of the Federal Constitution?

[4] For ease of reference, and unless otherwise stated specifically, any reference in this judgment to 'articles' shall be taken to mean references to the FC whereas any mention of s. 498 shall be construed to mean s. 498 of the PC.

[5] Given the line of argument advanced in this case and the nature of the law under scrutiny, two major issues arise for our determination:

(i) is s. 498 unconstitutional on the ground of unlawful discrimination?

(ii) secondly, if the answer to (i) above is in the affirmative (meaning that s. 498 is unconstitutional), what then is the effect of the declaration of unconstitutionality? The reason why this issue arises will become apparent later in this judgment.

Analysis/Decision On The Constitutionality Of Section 498

Article 8

[6] Before we delve into the arguments on the validity of s. 498, and since the constitutional question centres on art. 8, we think it is appropriate to first espouse the law on art. 8.

[7] Clauses (1) and (2) of art. 8 stipulate thus:

> Equality
>
> 8. (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

[8] In explaining the extent of the application of the two provisions above, Abdoolcader J said as follows in *PP v. Datuk Harun Hj Idris & Ors* [1976] 1 LNS 180; [1976] 2 MLJ 116 ('*Harun* – High Court'), at p. 119:

> Article 8(2) contains a specific and particular application of the principle of equality before the law and equal protection of the law embodied in Article 8(1). Therefore, discrimination against any citizen only on the

A grounds of religion, race, descent or place of birth or any of them in any law is prohibited under Article 8(2) and such discrimination cannot be validated by having recourse to the principle of reasonable classification which is permitted by Article 8(1) (*Srinivasa Aiyar v. Saraswathi Ammal* AIR 1952 Mad 193 at p. 195; *Kathi Raning Rawat v. State of Saurashtra* AIR 1952 SC 123 at p. 125).

B

In cases not covered by Article 8(2), the general principle of equality embodied in Article 8(1) is attracted whenever discrimination is alleged, and if accordingly discrimination is alleged on a ground other than those specified in Article 8(2), the case must be decided under the general provisions of Article 8(1). Article 8(1) and (2) must be read together, their C combined effect is not that the State cannot discriminate or pass unequal laws, but that if it does so, the discrimination or the inequality must be based on some reasonable ground (Article 8(1)), and that, due to Article 8(2), religion, race, descent or place of birth alone is not and cannot be a reasonable ground of discrimination against citizens. The word 'discrimination' in Article 8(2) involves an element of unfavourable bias.

D

The use of the word 'only' in Article 8(2) connotes that what is discountenanced is discrimination purely and solely on account of all or any one or more of the grounds mentioned in that clause. A discrimination based on any of these grounds and also on other grounds is not affected by Article 8(2) though it may be hit by Article 8(1) (*Anjali* E *v. State of West Bengal* AIR 1952 Cal 825 829 at p. 829).

[9] To summarise, both cls. (1) and (2) of art. 8, though related, are applied with differing specificity. In relation to art. 8(2), the standard presumption of constitutionality of legislation/Act applies. It is for the attacking party to overcome the presumption by demonstrating how the F impugned provision violates any one or more of the limbs of cl. (2). The use of the word 'only' in art. 8(2) requires that the alleged discrimination is specific to any of the grounds mentioned in cl. (2).

[10] Once the attack has been mounted, the defending party must then demonstrate either one of two things. First, that the impugned matter does G not discriminate on any of the grounds argued. Or, if this cannot be demonstrated, then the defending party is only left with the option of establishing that the discrimination is 'expressly authorised' by the FC.

[11] In this sense, art. 8(2) is a very specific provision. If a challenge is H successfully made on any of the grounds mentioned in art. 8(2), it would follow that the impugned matter/legislation/Act is inconsistent with the FC and is liable to be struck down under art. 4(1) if it is post-Merdeka. Otherwise, it must be dealt with in accordance with art. 162(6).

[12] Article 8(1), on the other hand, is a more generic provision when I compared to art. 8(2). Article 8(1) is a catch-all provision that outlaws discrimination in cases that might not fall within the umbrella of art. 8(2).

In such a challenge, and taking guidance from the decision of the Federal Court in *Datuk Hj Harun Hj Idris v. PP* [1976] 1 LNS 19; [1977] 2 MLJ 155 ('*Harun* – Federal Court'), two things must be shown.

[13] Firstly, it must be shown that the discrimination is founded on an intelligible differentia distinguishing between persons that can be grouped together from others left out of the group. Secondly, the differentiation must have a rational relation to the object sought to be achieved by the impugned law. The classification may be founded on different bases such as geography, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of the classification and the object of the law in question.

[14] In the relatively recent judgment of this court in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780*;* [2019] 4 MLJ 1 ('*Alma Nudo*'), this court also emphasised the importance of the test of proportionality which is housed in art. 8(1) read with art. 5(1). In other words, not only must there be a nexus between the impugned Legislative measure and the legitimate Legislative aim, but the measure itself (which infringes upon a fundamental right) must itself be proportionate to the legitimate Legislative objective. If it does not meet the test of reasonable classification or meets it but fails to have any nexus to any legitimate Legislative aim, then the impugned provision/act runs afoul of art. 8(1) and is liable to be dealt with either under arts. 4(1) or 162, as the case may be.

[15] At this point, another observation has to be made about art. 8(2). At the time *Harun* – High Court and *Harun* – Federal Court were decided, art. 8(2) had not yet been amended. In 2001, the FC was amended *vide* Act A1130 by inserting into art. 8(2) the word 'gender'. In other words, and in addition to the other specific stipulations, art. 8(2) also expressly prohibits (unless expressly authorised by the FC) discrimination in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment, *inter alia*, only on the grounds of gender.

[16] The 2001 constitutional amendment only added another prohibited category of discrimination (gender) but did not otherwise change the basis of the application of cls. (1) and (2) of art. 8 as espoused in *Harun* – High Court and *Harun* – Federal Court. As such, while the respondent has made the commendable attempt of taking us through the Legislative history of the amendment to art. 8(2) leading up to the insertion of the "gender" category, we do not, with respect, consider the said Legislative history relevant to the discussion in this case as nothing turns on it.

[17] Having set out the trite application of art. 8, we shall now set out the key points of contention between the parties as we understand them.

The Appellant's Case

[18] The appellant's argument is that s. 498 unlawfully discriminates against women. Learned counsel submits that the section follows the paternalistic and archaic approach of treating women as chattel to their husbands. An aggrieved husband is entitled to pursue the prosecution of any other person who has enticed or taken away his wife but there is no recourse to a wife whose husband is enticed by other woman. In other words, s. 498 only protects a husband's right to a peaceful and happy marriage without the interference of a third party. This, according to the appellant, discriminates against women by treating them with indignity and inequality in violation of both cls. (1) and (2) of art. 8.

[19] The appellant, however, does not stop at saying that s. 498 is unlawfully discriminatory. They argue that the entire ethos of s. 498 is archaic.

[20] Thus, for two seemingly intertwined reasons (discrimination and anachronism), the appellant urges the court to strike down s. 498. Paragraph 12 of the appellant's written submission dated 3 July 2023 states:

> 12. We humbly submit that in today's date and time, where the country is moving towards advocating gender equality, it is unfair for the Court's to deprive women of the right to equality. Laws that put men in control of their wives by depriving women the right to their sexuality and body which belongs to themselves must be abolished. Courts cannot allow provisions which treat the husband as his wife's master to remain on statutes. Courts cannot be the tool that allows women to be deprived of their gender equality. A statutory provision which demeans and degrades the status of a woman falls foul of the modern constitutional doctrine and must therefore be struck down.

The Respondent's Case

[21] The respondent maintains that s. 498 is not unconstitutional either under cls. (1) or (2) of art. 8. Based on our earlier brief exposition of art. 8, and as will be apparent further into this judgment, we only find it necessary to consider the respondent's arguments on art. 8(2).

[22] In justifying any possible discrimination in this case, the respondent appears to have merged the jurisprudence on cls. (1) and (2) of art. 8 together. In other words, the respondent has attempted to apply the reasonable classification test applicable to art. 8(1) to avoid the finding of discrimination under art. 8(2). This is exactly the sort of approach that Abdoolcader J in *Harun* – High Court suggested is not possible. In His Lordship's words, "discrimination against any citizen only on the grounds of religion, race, descent or place of birth or any of them in any law is prohibited under

art. 8(2) and such discrimination cannot be validated by having recourse to the principle of reasonable classification which is permitted by art. 8(1)." (See *Harun* – High Court, p. 119).

[23] We have explained this above but for clarity, it bears further explanation as follows. Article 8(1) is the all-encompassing provision on equality in that all persons are equal before the law and are entitled to the equal protection of the law. In this sense, clearly discernible persons or classes of persons can be differentiated and discriminated against provided that the discrimination bears a reasonable nexus to a legitimate aim (see *Harun* – Federal Court) and provided that the measure itself is proportionate to the said Legislative objective it serves (see *Alma Nudo*).

[24] Article 8(2), however, is a specific anti-discrimination provision that stipulates that "there shall be no discrimination" against citizens (as opposed to "all persons" on the grounds only of religion, race, descent, place of birth or gender. If that discrimination has been established and the discrimination is only on any of the grounds stated in art. 8(2), then such discrimination can only be justified by express authorisation from the FC itself. Given this express constitutional directive, it follows that in respect of any discrimination on any of the grounds only in art. 8(2), the general tests of art. 8(1) cannot apply.

Decision On Constitutionality Of Section 498 Of The Penal Code

[25] Having considered the law and parties' respective submissions, we are convinced that s. 498 is unconstitutional for the reason that it unlawfully discriminates only on the grounds of gender, which is violative of art. 8(2).

[26] Section 498 only entitles husbands to rely on the provision to the exclusion of all wives. This is, as such, discrimination on grounds of gender only. The fact that this is the case is also made amply lucid by what is stated in s. 132 of the Criminal Procedure Code ('CPC'), a provision to which even the respondent refers and acknowledges. Section 132 states as follows:

> Where complaint by husband
>
> 132. No Court shall take cognizance of an offence under s. 498 of the Penal Code except upon a complaint made by the husband of the woman.

[27] The only legal defence available to the respondent is found in art. 8(2) itself, and that is to demonstrate that this discrimination on grounds of gender only is expressly authorised by the Constitution. The respondent has not alluded to any such defence, be it in its written or oral submissions. In other words, they have failed to point out any provision of the FC that expressly authorises discrimination on the grounds of gender only in the form that s. 498 connotes. As such, we find that s. 498 is inconsistent with art. 8(2), and on that basis, s. 498 is unconstitutional.

[28] We must state again that any of the respondent's attempts to justify the existence of s. 498 on the basis of reasonable classification or that it has any purported nexus to a legitimate Legislative aim is beside the point and incongruous to the stipulations of art. 8(2). Those arguments are therefore rejected.

[29] In the premises, we answer the constitutional question in the affirmative to the extent that it relates to art. 8(2). For reasons already explained, we do not consider it necessary to express any view on whether s. 498 is constitutional *vis-a-vis* art. 8(1).

The Finding Of Unconstitutionality – Repercussions

The Issue

[30] The only remaining issue in this judgment is the legal outcome of our finding of unconstitutionality.

[31] In their written submission, the appellant did not take a clear position as to whether s. 498 is a pre- or post-Merdeka law. In their oral submission, the appellant takes the position that s. 498 is 'no longer' a pre-Merdeka law, given that the PC was, in their submission (as a whole), codified in 1973. Irrespective of their stance on pre- or post-Merdeka law, the appellant nevertheless accepts that s. 498 was never amended ever since it was first enacted.

[32] The respondent, too, effectively accepts that s. 498 was never amended since it was first enacted in the original PC of India on 18 October 1860 which was later applied in the Federated Malay States ('FMS') in 1871 and the Unfederated Malay States ('UFMS') in 1872. We summarise the rest of the respondent's historical analysis as follows.

[33] In 1935, the FMS Penal Code was enacted and applied throughout the FMS. Then, on 18 December 1948, upon the formation of the Malayan Union, the 1935 Penal Code was extended in its application throughout Malaya *ie*, throughout the FMS and UFMS having repealed their previously applicable iterations.

[34] Eventually, on 31 March 1976, Parliament passed the Penal Code (Amendment and Extension) Act 1976 to extend the application of the FMS Penal Code to Sabah and Sarawak and to repeal the equivalent versions applicable in those individual jurisdictions.

[35] On 7 August 1997, the FMS Penal Code was revised and renamed the Penal Code (Act 574) with retrospective effect from 31 March 1976.

[36] Leaving aside the revisions and Legislative transformations to the codes that lead to the PC, both parties accept that s. 498 has remained substantively the same from when it was first enacted based on the Indian Penal Code.

Pre- And Post-Merdeka Laws, And Article 162 Of The FC

[37] In ordinary constitutional challenges, the methodology is rather straightforward. In a typical case, a legal provision is challenged on the ground that it is inconsistent with the FC and is therefore, by virtue of art. 4(1), void to the extent of the inconsistency. This is explained in greater detail by this court in *Wong Shee Kai v. Government Of Malaysia* [2022] 10 CLJ 1; [2022] 6 MLJ 102 ('*Wong Shee Kai*') – specifically, the difference between an-incompetency challenge and aninconsistency challenge.

[38] In summary, an incompetency challenge can only be brought under art. 4 – specifically cls. (3) and (4) thereof. The operative words of cl. (3) in particular are "the validity of any law made by Parliament or the Legislature of any State". It follows that a law that is challenged under cls. (3) and (4) of art. 4 must, in the first place, have been passed by Parliament or the Legislature of any State.

[39] This makes sense, considering that Parliament and the State Legislatures, as they exist now, owe their existence to the FC, which reigns supreme over them and all other branches of Government. In fact, Legislative power is derived from the FC, unlike, for example, the United Kingdom, where Parliament is supreme or the ultimate constitutional authority.

[40] The facts of this case bring to the fore an entirely different yet limited species of cases that do not fall within the ambit of art. 4. The significance of art. 4 is that it declares the FC supreme. But, in terms of striking down laws that are inconsistent with the FC, cl. (1) clarifies that it only applies to laws passed after 31 August 1957 *ie*, Merdeka Day. "Merdeka Day" is a term very clearly and emphatically defined in art. 160(2) as follows:

> "Merdeka Day" means the thirty-first day of August, nineteen hundred and fifty-seven;

[41] Having understood this, we now turn our attention to pre-Merdeka laws. While we, for ease of understanding, call them pre-Merdeka laws, the FC actually has a defined term for these laws, describing them as "existing laws". In this regard, art. 160(2) provides thus:

> "existing law" means any law in operation in the Federation or any part thereof immediately before Merdeka Day;

[42] Hence, any reference to "pre-Merdeka" laws in this judgment is necessarily a reference to "existing laws" as defined in art. 160(2). And such laws are governed by art. 162, the relevant portions of which stipulate the following:

A Existing laws

162. (1) Subject to the following provisions of this article and art. 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this article and
B subject to any amendments made by Federal or State law.

(6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.

C (7) In this article "modification" includes amendment, adaptation and repeal.

[43] The rationale for this provision is to cater for laws which were enacted prior to Merdeka Day *ie*, a period of time where the FC did not yet exist. Taking the original version of the PC for instance, it was enacted in the late
D 1800s – a time long before the existence of an independent Malaya (later Malaysia), let alone with its own written FC. There was therefore at the time, and strictly speaking, no contemplation of a written supreme document making provisions, for example, on separation of powers, the delineation of Legislative powers/fields or a written guarantee of fundamental liberties.

E **[44]** Presumably to overcome the need to redraft and re-enact laws which are in line with the FC, art. 162(1) specifically states that those laws are to remain in force as "existing laws" subject to modifications made either: one, under art. 162 or two, by Federal or State law. The second implication of art. 162 is that if the existing law has not been modified under art. 162, then
F any court or tribunal applying it may apply with any such modifications necessary so as to bring the law into accord with the FC. "Modification" in art. 162(7) is defined as including "amendment", "adaptation" and "repeal".

[45] Now, the appellant alleges that s. 498 is no longer a pre-Merdeka or "existing law" because the PC was codified, in their submission, in 1973.
G Perhaps they meant 1976. In any case, before determining whether s. 498 is no longer a pre-Merdeka law, it would be useful to analyse a few cases that explain the application of art. 162(6) and (7).

[46] Perhaps the earliest case is the decision of the Privy Council in
H *B Surinder Singh Kanda v. The Government Of The Federation Of Malaya* [1962] 1 LNS 14; [1962] 1 MLJ 169 ('*Surinder*'). In that case, the plaintiff had challenged his dismissal from the police force, among others, on the grounds that he was dismissed by a body lower in rank to the body that had the power to dismiss a police officer of his rank. In determining the appeal, the Privy Council had to consider which was the appropriate authority to dismiss the
I plaintiff, given that there were changes in the service structure of the Police Commissions from pre- to post-Merdeka.

[47] Lord Denning made the following observation, at p. 171:

> If there was in any respect a conflict between the existing law and the Constitution (such as to impede the functioning of the Police Service Commission in accordance with the Constitution) then the existing law would have to be modified so as to accord with the Constitution. There are elaborate provisions for modification contained in art. 162 ...
>
> It appears to their Lordships that, in view of the conflict between the existing law (as to the powers of the Commissioner of Police) and the provisions of the Constitution (as to the duties of the Police Service Commission) the Yang di-Pertuan Agong could himself (under art. 162(4)), have made modifications in the existing law within the first two years after Merdeka Day. (The attention of their Lordships was drawn to modifications he had made in the existing law relating to the railway service and the prison service.) But the Yang di-Pertuan Agong did not make any modifications in the powers of the Commissioner of Police, and it is too late for him now to do so. In these circumstances, their Lordships think it is necessary for the Court to do so under art. 162(6). *It appears to their Lordships that there cannot, at one and the same time, be two authorities, each of whom has a concurrent power to appoint members of the police service. One or other must be entrusted with the power to appoint. In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail.*
>
> (emphasis added)

[48] Clause (4) of art. 162 has since been repealed by Act 25/1963. Nevertheless, the observations of the Privy Council remain relevant insofar as they concern "existing" or pre-Merdeka laws which at the time they come to be applied by a court or tribunal, have not yet been modified to be in accord with the FC. In this regard, Lord Denning observed, at p. 171:

> The Court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution. The necessary modification is that since Merdeka Day it is the Police Service Commission (and not the Commissioner of Police) which has the power to appoint members of the police service. And that is just what has happened. The Police Service Commission has in fact made the appointments. And their Lordships are of opinion that they were lawfully made.

[49] As such, the Privy Council read the law as modified and applied it to the case. Our reading of *Surinder* also suggests that the constitutional imperative to any court or tribunal applying a pre-Merdeka law that is inconsistent with the FC is a mandatory one in spite of the use of the phrase "may apply it with such modifications" in art. 162(6). This is suggested by Lord Denning in the above passage, where he says that "[t]he court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution".

[50] Thus, under art. 162(6), the courts simply do not have the option of ignoring having to modify a pre-Merdeka or "existing law" when doing so is necessary to bring that provision into accord with the FC. The fact that this is a mandatory exercise despite the word "may" is suggested in art. 162(6) because the courts can only modify the law if "it has not been modified on or after Merdeka Day". Under art. 162(1), only "the authority having power to do so under this Constitution" has the ability to amend it subject to amendments made by Federal or State law. It follows that where neither the "authority having power to do so" (including Parliament or the State Legislature) have performed this duty, the courts applying that law must then, as a final consequence, do it in their stead. The courts' refusal to do so would tantamount to a condonation of a constitutional violation and end up amounting to a dereliction of the Judicial oath and duty to "preserve, protect and defend" the FC.

[51] The next case relevant to this discussion and which also refers to *Surinder*, is the judgment of the Court of Appeal in *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169; [2005] 6 MLJ 289 ('*Sagong Tasi*'). The case concerned, among others, the interpretation and application of the Aboriginal Peoples Act 1954 ('APA 1954') in terms of, among other things, compensation for the acquisition of land from aboriginal people.

[52] In that case, ss. 11 and 12 of the APA 1954 provided for compensation to aboriginal peoples in the event that their land was acquired if their community could establish a 'claim to fruit or rubber trees on any State land which is alienated, granted, leased for any purpose, occupied temporarily under licence or otherwise disposed of'. The learned judge who heard the matter at first instance was of the view that any compensation to be awarded to the plaintiffs in that case ought to be awarded in terms of the Land Acquisition Act 1960 ('LAA 1960') and not the APA 1954. The Court of Appeal agreed with this approach when it was challenged on appeal.

[53] The Court of Appeal most pertinently observed as follows:

> [36] After careful consideration, I do not agree with the defendants' submissions. I think that the judge in the court below was right. And I will explain why.
>
> [37] So far as s 11 is concerned, it deals only with any claims the plaintiffs may have to fruit or rubber trees on their land. It has nothing to do with the deprivation of their customary community title to the land. As regards s. 12, it is a pre-Merdeka provision. It must therefore be interpreted in a modified way so that it fits in with the Federal Constitution ...

[54] The Court of Appeal then went on to explain how the modification ought to be done in that case, as follows:

> [40] That is achieved by not reading the words 'the State Authority may grant compensation therefor' as conferring a discretion on the State Authority whether to grant compensation or not. For otherwise it would

render s. 12 of the 1954 Act violative of art. 13(2) and void because it will be a law that provides for the compulsory acquisition of property without adequate compensation. A statute which confers a discretion on an acquiring authority whether to pay compensation or not enables that authority not to pay any compensation. It is therefore a law that does not provide for the payment of adequate compensation and that is why s. 12 will be unconstitutional. Such a consequence is to be avoided, if possible, because a court in its constitutional role always tries to uphold a statute rather than strike it down as violating the Constitution.

[55] The following observation is also crucial:

[41] How then do you modify s. 12 to render it harmonious with art. 13(2)? I think you do that by reading the relevant phrase in s. 12 as 'the State Authority shall grant adequate compensation therefor.' By interpreting the word 'may' for 'shall' and by introducing 'adequate' before compensation, the modification is complete. *I am aware that ordinarily we, the judges, are not permitted by our own jurisprudence, to do this. But here you have a direction by the supreme law of the Federation that such modifications as the present must be done. That is why we can resort to this extraordinary method of interpretation.* (emphasis added)

[56] And thus, by amending s. 12 of the APA 1954 and adding the phrase "adequate compensation" into that section, it served the twofold purpose of: one, not putting s. 12 at odds with art. 13(2) and second, rendering the principles of adequate compensation in the LAA 1960 applicable in accord with art. 13(2).

[57] From the foregoing cases, we surmise the following principles relating to cls. (6) and (7) of art. 162:

(i) at the time a court or tribunal is called upon to apply a pre-Merdeka law, and that law has not yet been modified either under art. 162 or by Federal or State law, then the court has the duty to modify the law to bring it into accord with the FC. This is a mandatory judicial duty in spite of the use of the words "may apply it with such modifications as may be necessary" in art. 162(6). "May" does not, in this context, unlike in some other cases, denote a discretionary power.

(ii) the power to "modify" includes adapting, amending, or repealing that law. This is a unique power which borders on Legislative power. While that may be so, it is a unique power of interpretation applicable only to "existing laws" or pre-Merdeka laws conferred unto the Judiciary by the FC itself with a view to bringing the law into accord with the FC and not for any other purpose.

(iii) as a pervading rule, courts are slow to strike down laws as they are presumed to be constitutional. This rule applies to pre-Merdeka (or "existing" laws) in as much as it is to post-Merdeka laws. That said,

a stronger indication that points to a lesser constitutional inclination to strike down or "repeal" a pre-Merdeka law is, in our view, also strongly implied by art. 162(7) itself. This is because "modification" is defined in art. 162(7) as including, in addition to repeal, amendment and adaptation with a view to "bringing into accord" the pre-Merdeka law with the FC. And thus, where a law can be applied with after amendment or adaptation, repealing it or striking it down is not necessary.

(iv) as a corollary to (iii) above, it follows that how the courts deal with and apply an impugned pre-Merdeka law depends on the pre-Merdeka law that is in question.

[58] To illustrate point (iv) above, the case of *Sagong Tasi* (*supra*) is in our view, an apt illustration of where the court, with a view to bringing the law into accord with FC, amended the relevant provision of the APA 1954. *Surinder* is perhaps an apt illustration of adaptation where the court read one pre-existing legal term to mean another legal phrase later used in the FC with a view to synchronising appointing authorities.

[59] In the above two case examples, repeal or striking down did not appear to be the preferred measure for bringing those impugned provisions into accord with the FC.

[60] In terms of criminal legislation, one example that commends itself to us is the minority judgment of this court in *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147 ('*Letitia*'). One of the many issues raised in that case was the constitutional validity of s. 302 of the PC which contains the offence and sentence for murder. The mandatory death penalty provision was attacked as being unconstitutional. By 8-1, the majority of the Federal Court found that the mandatory death penalty was constitutional. It is not our intention to revisit the arguments raised in that case on their merits but only to determine how the minority judgment dealt with s. 302 upon arriving at the conclusion that the mandatory death sentence – as the only sentence prescribed – was unconstitutional.

[61] Nallini FCJ, in her minority judgment, identified that s. 302 was enacted pre-Merdeka and continued, at that time, to be enforced and in those circumstances, it had to be dealt with in accordance with cls. (6) and (7) of art. 162. Per Nallini FCJ:

> [330] The optimum solution is to modify s. 302 PC such that the sentence affords the court the option of punishment of either life imprisonment or the death penalty. Such modification permits the court to make a decision as to the most appropriate punishment to be meted out in accordance with the particular facts and circumstances of each case. The proposed modified provision would read:

Punishment for murder

302. Whoever commits murder shall be punished:

(a) With imprisonment for life; or

(b) Death.

[62] Assuming the minority judgment had adopted the course of striking down or repealing the punishment for murder, the end result would have been that there would not have been any punishment for murder whatsoever. Since art. 162 provides recourse to the courts in the form of interpretation by way of modification, it is clear that the more drastic measure of repeal should remain the last choice. We, therefore, respectfully concur with that part of Nallini FCJ's minority judgment *ie*, on the interpretation and application of cls. (6) and (7) of art. 162. The modification proposed in the minority judgment did not have the effect of changing either the character of the sentence or the offence of murder because it retained the death penalty and modified only that much of s. 302 of the PC, which made the imposition of such a grievous punishment mandatory.

[63] With the law and relevant case examples in mind, the next step in this analysis is to determine whether or not s. 498 is a pre-Merdeka or "existing" law.

Whether Section 498 Is A Pre-Merdeka Law

[64] It is our view that s. 498 is a pre-Merdeka law. It follows that we do not agree with the appellant that s. 498 is or has become a post-Merdeka law. Our reasons are as follows.

[65] During oral argument, the appellant suggested that while s. 498 was adopted (and remains unamended) from the Indian Penal Code when it was first enacted in the FMS and UFMS, it has, over time, been codified in the Penal Code. It is therefore, in their submission, no longer pre-Merdeka law.

[66] In our view, while Parliament may have, throughout the years, amended the Penal Code numerous times, that in itself is insufficient to render s. 498 a post-Merdeka law. We have arrived at this conclusion upon a wholesome reading of art. 162. Clause (1) thereof reads as follows, in material part:

> (1) Subject to the following provisions of this Article ... the existing laws shall, ... continue in force on and after Merdeka Day, with such modifications as may be made therein under this article and subject to any amendments made by federal or State law.

[67] At first blush, the appellant's argument appears to make sense as according to art. 162(1), the existing law in question shall continue in force "subject to any amendments made by Federal or State law." The question is whether an amendment to a statute generally or to one of its unrelated

provisions also keeps into force some other unrelated provision within it. In our view, the appellant's position cannot be correct if we have regard to the words in cl. (6) of art. 162, which state:

> (6) Any court or tribunal **applying the provision of any existing law** which has not been modified on or after Merdeka Day under this article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.
>
> (emphasis added)

[68] The emphasised words "applying the **provision** of any existing law" suggest that the framers of the FC had in mind that courts will consider the validity of an existing law not purely on an "entire statute" basis but based on individual provisions (emphasis added). As such, we are unable to sustain the appellant's interpretation of what is meant by "no longer" a pre-Merdeka law as regards s. 498.

[69] Our view is also further fortified by our reference to art. 4(1) which applies to post-Merdeka laws. Specifically, the phrase "shall, to the extent of the inconsistency, be void" also suggests that the framers had intended by default that all laws should, unless otherwise expressed or implied by Parliament, be considered severable. As such, the striking down of one unrelated provision would not affect an otherwise unrelated provision in the same law. The constitutional design as regards laws passed after Merdeka Day which attract art. 4(1) and pre-Merdeka (or "existing" laws) which attract art. 162 appear to be consistent.

[70] Hence, we take the view that until and unless it can be shown that a pre-Merdeka or "existing" law has either expressly or impliedly (in one form or another) been modified either by Federal or State law as expressly suggested by art. 162(1), then the assumption must remain that at the time the court or tribunal is applying the said impugned law, it has not yet been modified by legislation passed either by Parliament or the State Legislatures, as the case may be.

[71] This view of ours is also supported by the fact that from the respondent's submission, the various extensions that happened over the years with the last one in 1976 to extend the PC's application throughout Malaysia was merely to render it in force. Whether or not an individual provision has been modified remains to be tested on a case-to-case basis. And, on the facts of the present case, there is nothing on record or in our research to suggest that s. 498 has ever been modified by Federal law. Even parties concede that this is so.

[72] Additionally, and for completeness, it has not escaped our attention that the Penal Code was revised in 1997. However, it is our view that this does not materially change the outcome in this case sufficiently enough to establish the invocation of art. 162(1) to convert s. 498 from a pre-Merdeka law to a post-Merdeka law.

[73] As stated earlier, it has not been shown that Parliament or the State Legislature had validly amended the pre-Merdeka law in question. The Revision of Laws Act 1968 (Act 1) ("RLA 1968") does not, in our view, qualify as "any amendments made by Federal or State law". This is also clarified beyond doubt by the lengthy provision of s. 6 of the RLA 1968 which although it allows the Commissioner to make 'amendments' to laws, such amendments, by virtue of sub-ss. (2) and (3), cannot affect the substance of the law. The said s. 6(2) and 6(3) of the RLA 1968 read:

> (2) In subsection (1) "amendment" includes, where it is used in relation to the powers conferred upon the Commissioner, any variation of any law which is necessary for giving effect to any enactment in any other law whereby the scope, effect or construction of any provision of the first mentioned law is varied, modified, enlarged, restricted, qualified or otherwise affected.
>
> (3) The powers conferred on the Commissioner by subsection (1) shall not be taken to imply any power in him to make any alteration or amendment in the substance of any law.

[74] In the circumstances, we hold that s. 498 is a pre-Merdeka or "existing" law within the meaning of art. 162.

Effect Of This Judgment

The Legal Predicaments

[75] At this point, we have found that s. 498 is inconsistent with art. 8. We have also found that s. 498 is a pre-Merdeka law and in light of cls. (6) and (7) of art. 162, this court cannot immediately take the approach of simply suggesting to strike it down as is the only option under art. 4(1) for post-Merdeka laws. According to cl. (6), we must apply s. 498 "with such modifications as may be necessary to bring it into accord with the provisions of the FC". Two predicaments arise at this point of this judgment.

[76] The first predicament is this. Parties, in their submissions (written and oral), have made valiant attempts to respectively assail and defend the constitutional validity of s. 498 against art. 8. However, neither one of the parties has lent much assistance on how s. 498 is to be modified. The appellant, as stated earlier, has taken the erroneous position that s. 498 is "no longer" a pre-Merdeka law. The respondent, on the other hand, has not considered any alternative to our possible finding that s. 498 is unconstitutional.

[77] The second predicament is that the present case arises in the form of a constitutional reference and that too originally from the Magistrates' Court. Section 84(3) of the CJA 1964 states that in transmitting a special case to the Federal Court, the High Court shall, "state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case

which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative." In short, the Federal Court appears to be limited in its function to only providing a yes or no answer to the constitutional question referred to it.

[78] The above is also jarring in light of s. 85(2) of the CJA 1964 which states:

> (2) When the Federal Court shall have determined any special case under this section the High Court in which the proceedings in the course of which the case has been stated are pending shall continue and dispose of the proceedings in accordance with the judgment of the Federal Court and otherwise according to law.

[79] One could, therefore, fairly take the position that based on ss. 84(3) and 85(2) of the CJA 1964, the Federal Court after determining the question of constitutionality, should transmit the case to the High Court to make the appropriate modification to the pre-Merdeka law. In light of the provisions of the CJA 1964 and the limited nature of the reference jurisdiction of this court, we would tend to agree that this is the best approach.

[80] Having said that, the Federal Court being the apex court and when dealing with constitutional questions on a pre-Merdeka law, can still upon answering the question or questions in the affirmative or negative, make suggestions on how the High Court should modify the impugned law with a view to bringing it into accord with the FC. That leaves us with the first predicament on the basis to constitutionally modify s. 498 under art. 162.

Modification Of Section 498

[81] As has been suggested in this judgment, the one and only goal of judicial modification under art. 162(6) is to bring the impugned provision into accord with the FC. On the facts of this case, the appellant's primary argument is that s. 498 unlawfully discriminates only on the ground of gender in violation of art. 8(2). In this regard, and considering that this is a constitutional reference, we are only left to consider what is the best constitutional recourse for the High Court. Should s. 498 be judicially adapted, amended or repealed?

[82] In considering what is the best recourse, we shall first consider the option of adapting the law. In our view, and taking the example of *Surinder*, adaptation is not the appropriate course as there is no Federal law that has been brought to our attention upon which s. 498 can be adapted. This option of modification of s. 498 is therefore not possible on the circumstances of this case. That leaves us to consider either amendment or repeal.

[83] Since repeal is the last option, we have agonised long and hard over whether s. 498 can be retained as law by bringing it into accord with the FC by way of amendment. Since s. 498 discriminates in the way prohibited by art. 8(2), it is logical to suggest at first blush that s. 498 can be amended by

reading it in a way that removes the unlawful gender-based discrimination and thereby applies the section equally to both spouses. Upon deliberation and consideration of this hypothetical suggestion, it is our view that amending the provision to apply to both spouses equally is not a possible outcome in the circumstances of this case.

[84] This then presents an opportune moment to interpret the words "amendment" and "repeal" as employed in art. 162(7).

[85] As a general rule, "to amend" a law also includes the option of repealing it. See for instance the definition of "amend" in s. 3 of the Interpretation Acts 1948 and 1967 (Act 388). While Act 388 cannot apply to the FC, Act 388's definition of "amend" is no less declaratory of a longstanding principle of law that "repeal" is a form of "amendment". This principle remains applicable to the FC inasmuch as it is applicable to ordinary laws. In fact, art. 159 which caters for the procedure to amend the FC itself states in cl. (6) that any reference to "amendment" in art. 159 includes addition and repeal. This again makes logical sense from an interpretive and Legislative standpoint as an amendment to any law (including the FC) is required to give effect to a repeal of that law or any of its provisions.

[86] With this in mind, the words: "amendment" and "repeal" in art. 162(7) come into sharp focus. Curiously, if in the ordinary general sense "amendment" includes "repeal", why then would the drafters of the FC see the need to re-emphasise that modification could include "amendment" and "repeal"? "Adaptation" is an interpretive exercise where one provision is read in accordance with a later provision. For all intents and purposes, art. 162(7) could have been worded as "[i]n this article "modification" includes amendment and adaptation" and based on the ordinary understanding, "amendment" would have included repeal.

[87] To our minds, the need to make "repeal" distinct from "amendment" is to make it absolutely clear that in cases where "amendment" is not possible, "repeal" would be a clearly expressed exercisable option to bring that law into accord with the FC. Absent any means to "adapt" the pre-Merdeka law, what then could be the appropriate case where "amendment" is not possible, leaving only "repeal" as the only possible alternative?

[88] Giving significance to the phrase "bring into accord with the provisions of this Constitution" in art. 162(6), the courts cannot embark on judicial legislation. What this means is that the courts can, under art. 162 amend pre-Merdeka law to make it into accord with the FC but the purpose of that exercise is solely to make the said pre-Merdeka law consistent with the FC. The process of "amendment" under art. 162(7), in that sense, cannot

A end up destroying or reinventing the Legislative intent upon which the pre-Merdeka law was enacted. Viewed in this way, judicial amendment as understood from art. 162(7) is not conceptually the same as Legislative amendment. The judicial exercise is limited to only bringing the law into accord with the FC in light of its original intent. If that is not possible, then
B the courts cannot go a step beyond that and amend the law beyond its original intent.

[89] By parity of reasoning, if the court in attempting an "amendment" must stretch the provision beyond its original intent to fit it to the FC (which is judicial legislation), then art. 162(7) in expressly singling out the phrase
C of "repeal" from "amendment" serves to guide the court to the idea that repealing that law is a feasible final option to bring that law into accord with the FC.

[90] It is our view that the approaches taken in *Sagong Tasi* and the minority in *Letitia* are clear and valid examples of accepted judicial
D "amendment" under art. 162(7). The outcomes in those cases do not, in our view, amount to judicial legislation. In *Sagong Tasi*, the relevant provision of the APA 1954 had already catered for compensation for the acquisition of native land. However, the pre-Merdeka provision was constitutionally insufficient and the court judicially amended the impugned provision such
E that the APA 1954's standard of compensation met the requirement of adequate compensation in art. 13(2) of the FC. In *Letitia*, the minority judgment retained the death penalty but rendered it discretionary. Neither the character of the offence of murder nor the severity of the punishment was fundamentally altered in any way. The death penalty was retained just that
F it was turned into a discretionary sentence.

[91] There is no case law to the best of our research that can help illustrate the reverse scenario in the two cases above, *ie*, an example that can illustrate judicial legislation as opposed to judicial amendment under art. 162(7). To illustrate our point, we think the following hypothetical example is apposite.

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[92] Let us assume for a moment that there was in existence a pre-Merdeka law that allowed the Government to enslave someone using words to the effect that "X persons may be held as slaves (for designated reasons)." On Merdeka Day, art. 6(1) came into force prohibiting absolutely slavery but allowing in cl. (2) compulsory service for national purposes. In defending the
H constitutional validity of that law, the Government argues that the clauses may be judicially amended to read: "X persons may be held as slaves for compulsory service for national purposes (for designated reasons)." If the court were to accede to such a suggestion, it would, in our view, stray from judicial amendment under art. 162(7) and amount instead to judicial
I legislation. This is because allowing that kind of amendment would be akin to changing the original intention of the law simply for the reason of retaining

it. The only option in that scenario would be to repeal that law as it is only in that way that the impugned pre-Merdeka law can be brought into accord with the FC.

[93] And thus, and considered as a whole, judicial amendment in art. 162(7) can be used as an interpretive aid to "enhance" or modify legislation to bring it into accord with the FC. It cannot however be the chosen method if amending that pre-Merdeka involves changing its nature or character against its original base Legislative intent. In such a case, repeal is the only possible outcome for making that law consistent with the FC.

[94] This brings us back to s. 498. In our view, s. 498 is incapable of judicial amendment under art. 162(7) because doing so would require extensive amendment to the extent of changing the character of the offence. Both parties either accept or do not deny that the sole purpose of the section was to view women as chattel to their husbands to the extent that the enticement/taking away/detention of them is considered an offence.

[95] While the respondent maintains that the offence should survive to protect interference with marriages, we do not agree that the section was originally enacted for that broad purpose. If the purpose of s. 498 was always to protect marriages, then the law would have been drafted in that way to reflect such a Legislative intent. Instead, the law was drafted to protect the rights of husbands by allowing them to seek the prosecution of anyone who effectively stole their wives from them.

[96] That the law was intended only to apply to the enticement of women only is also made amply clear by s. 132 of the CPC cited earlier which states that no court can take cognisance of a s. 498 offence unless the complaint is lodged by the husband of the married woman. Amending s. 498 to apply to both spouses would also be meaningless without amending s. 132 of the CPC and in this case, no one has addressed the validity of s. 132 even though it is also a pre-Merdeka law capable of being modified under art. 162. In any case, the provision of s. 498 is so intricately drafted that amending it without changing its base Legislative intent is judicially impossible.

[97] Thus, while a judicial amendment to s. 498 in the way constitutionally permitted by art. 162(7) would remove the discrimination, that exercise of the amendment would also tantamount to redefining the original purpose of the section to the extent that it would alter the very basis upon which the offence in s. 498 was originally enacted. In our view, doing this would not amount to solely bringing the provision of s. 498 into accord with the FC but to an act of judicial legislation.

[98] We are therefore satisfied, based on our reasoning earlier, that the only possible means to bring s. 498 into accord with the FC is to judicially repeal it in its entirety.

A **Judicial Legislation**

[99] We find it necessary to conclude this judgment by commenting on the submission of the appellant that ties in with our earlier concerns on judicial legislation.

B **[100]** We fully agree with the appellant that s. 498 is an archaic and anachronistic provision which comes from an unfortunate bygone Victorian era when women were regarded as the personal property of men or even an extension of men not unlike how slaves were treated for a long time until abolished in the last century. It took humankind many years to accept that the slavery of men and discrimination against women were wrong. So, to C suggest that a man or a woman could be considered as property of each other is a regressive step and going back in time to a dark era. We would state and that too without much hesitation that this concept is, to our minds, obsolete. In the modern era, men and women are both capable of being independent and making their own decisions. They can hardly be considered as victims D of enticement.

[101] Having said that, we are mindful of the constitutional limits of the Judiciary and the fact that s. 498 is anachronistic had no bearing to our assessment of its constitutional validity. Whether a law should exist *per se* on E the grounds of anachronism is a Legislative matter. And while it is true that art. 162(6) allows the Judiciary to modify a pre-Merdeka law in a way resembling Legislative power, this judgment clarifies that such a power must only be applied to the extent of bringing that pre-Merdeka law into accord with the FC and not for the purpose of "judicial reformation". And so, whether or not this anachronistic law of s. 498 should remain in our statute F books purely on the ground that is outdated is, *per se*, purely an academic Legislative question and one that our elected lawmakers must deliberate upon if they, after this decision, think it necessary to revive it in one form or another.

G **[102]** To put it in another way, constitutional challenges can only go as far as attacking Legislative validity and not Legislative desirability. Legislative desirability concerns the public's subjective and private view of what the law should or should not be. Constitutional validity, on the other hand, deals with the objective compliance of the impugned law *vis-a-vis* the FC. And when it concerns pre-Merdeka law, the Judiciary is only objectively H empowered to modify the law to the extent of rendering the law valid. Repeal is the last option where the only way to render the law valid would be to delete it. In this regard, we bear in mind the timeless reminder by the late Lord President Suffian who in his treatise *An Introduction to the Constitution of Malaysia* (3rd edn, Pacifica Publications, 2007), at p. 18, said as follows:

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> If Parliament is not supreme and its laws may be invalidated by the courts, are the courts then supreme? The answer is yes and no – the courts are supreme in some ways but not in others. They are supreme in the sense

> that they have the right – indeed the duty – to invalidate Acts enacted outside Parliament's power, or Acts that are within Parliament's power but inconsistent with the Constitution. But they are not supreme as regards Acts that are within Parliament's power and are consistent with the Constitution. **The court's duty then is quite clear; they must apply the law in those Acts without question, irrespective of their private view and prejudice**.
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> (emphasis added)

[103] The Judiciary or individual judges cannot engage in judicial legislation or reformation to the extent of substituting their private views for the law. At the risk of repetition, anachronism and the question of s. 498's outdatedness is a problem that extends beyond the judicial approach. We state again that s. 498 should be repealed under art. 162 not on the ground that it is anachronistic and archaic but for the sole reason that adapting it or amending it would not otherwise satisfy the requirement of art. 162 to, in this case, bring s. 498 into accord with art. 8(2).

Conclusion

[104] Our judgment herein is to be taken to have effect prospectively. It is trite that judgments, especially in constitutional cases, can be declared to have prospective effect. If at all authority is needed for this proposition, then we find considerable support for it in the *dictum* of Abdoolcader SCJ in *PP v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284; [1987] 2 MLJ 311 at p. 320. This declaration of prospectivity seeks to preserve all previous prosecutions that have already come to pass.

[105] We hereby remit this case to the High Court to be dealt with in accordance with s. 85 of the CJA 1964. It is: (1) for the High Court to make the appropriate declarations and orders to give effect to this judgment and otherwise in accordance with the law, and (2) to thereafter make the appropriate directions for the ongoing proceedings at the Magistrates' Court which is where the charge was originally preferred.